

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X **Docket#**
KARLENE A. GORDON, : 09-cv-4577 (ERK) (MDG)
Plaintiff, :
 :
- versus - : U.S. Courthouse
 : Brooklyn, New York
CITY OF NEW YORK, et al., :
Defendant : November 10, 2011
-----X

TRANSCRIPT OF CIVIL CAUSE FOR CONFERENCE
BEFORE THE HONORABLE MARILYN D. GO
UNITED STATES MAGISTRATE JUDGE

A P P E A R A N C E S:

For the Plaintiff:

Da'Tekena Adokiye
Barango-Tariah, Esq.
Da' Tekena Barango-Tariah
Attorney at Law
25 Bond Street
Second Floor
Brooklyn, NY 11201

For the Defendant:

Jeffrey S. Dantowitz, Esq.
The City of New York
Law Department
100 Church Street
New York, NY 10007

Transcription Service:

Transcription Plus II, Inc.
3589 Tiana Street
Seaford, N.Y. 11783
Transcriptions2@verizon.net

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1 THE CLERK: Gordon v. City of New York, et al,
2 docket number 09-cv-4577.

3 Will counsel present please state their names
4 for the record. For the plaintiff?

5 MR. BARANGO-TARIAH: Da' Tekena Barango-Tariah.
6 Good afternoon, your Honor.

7 THE COURT: And for the defendant?

8 MR. DANTOWITZ: Jeffrey Dantowitz, Assistant
9 Corporation Counsel for the defendants. Thank you, your
10 Honor, for allowing me again to appear by phone.

11 THE COURT: And I note for the record that the
12 plaintiff, Ms. Gordon, is in the courtroom, too.

13 Now I think the docket sheet speaks for itself
14 but we did originally reach what I thought was a
15 settlement of this case and apparently there was no full
16 agreement and once -- after we had a discussion about the
17 inability -- the unwillingness of the plaintiff to sign
18 settlement documents, Mr. Barango-Tariah indicated that
19 he was going to move to withdraw and you haven't filed
20 such papers. So, this matter was scheduled for a
21 conference today on the motion to withdraw. So I don't
22 know what this signifies, Mr. Tariah.

23 MR. BARANGO-TARIAH: Your Honor, what actually
24 happened was that I was supposed to consult with my
25 client and based on that, I would either -- your Honor,

1 what it was, I was supposed to be consulting with my
2 client and based on that, I was -- we were going to be
3 either proceeding with settlement or I was going to be
4 filing the motion to withdraw. But when I spoke with my
5 client, she told me that she wanted more money and I said
6 okay, let me reach out to the defendants.

7 THE COURT: Okay. Then we'll -- okay, go
8 ahead. Please don't discuss numbers because we're on the
9 record.

10 MR. BARANGO-TARIAH: Yes, yes.

11 THE COURT: And we will seal --

12 MR. BARANGO-TARIAH: I will not, your Honor.

13 THE COURT: Okay. Go ahead.

14 MR. BARANGO-TARIAH: So she said she needed
15 more money. So I did reach out to the defendants and I
16 actually asked her how much she wanted and she told me
17 the amount. I then reached out to the defendants. They
18 subsequently filed a Rule 660(a).

19 So I called my client in to explain that to her
20 and then I subsequently asked her again "Is that money
21 that you say you want, is that what you want?" She said
22 "Yes." I said, "Okay. Why don't I call defense counsel
23 while you are here and communicate that to defense
24 counsel?"

25 So, I did and I asked -- I told defense counsel

1 that my client was in the office and he said "Well, am I
2 sure that is the amount that she would settle for?" And
3 I said "Yes." And I said, "Well, she's is right here.
4 Do you want to speak to her?" And my client then spoke
5 to the defense counsel and that was -- and that amount
6 was confirmed.

7 Subsequently, defense counsel offered us more
8 money. It wasn't up to the amount. He offered us more
9 money and we didn't -- I then spoke to defense counsel
10 and it was agreed that since she needed an amount of
11 money, they're going to be giving that lump sum money and
12 the balance will be coming out from attorney's fees. And
13 I agreed. So they did then come up to that amount. And
14 based on that, the defense counsel then prepared a
15 stipulation.

16 However, my client has informed me today that
17 she is not going to take -- that she's not going to
18 settle for that amount anymore. That she does want to
19 proceed. So that's where we are, your Honor.

20 THE COURT: Okay. Maybe what I can do is let's
21 just seal this portion of the record and we'll just
22 continue these discussions, so we can talk about numbers
23 and I'll have a fuller idea of what the impious is to
24 settlement. Okay. So we'll close -- seal these
25 proceedings from this point until such time as we unseal

1 -- conduct unsealed proceedings. Okay.

2 MR. DANTOWITZ: Thank you, your Honor. I
3 appreciate that, so we can speak freely about numbers and
4 hopefully reach some resolution today. If I might be
5 heard just very briefly and I think we can -- I can bring
6 some numbers into play here. Some time ago, this was
7 even before my involvement in the case, when Ms. Gantz
8 was on the case, it was my understanding that the
9 plaintiff had agreed to accept \$21,000 in settlement of
10 the case. Various papers were signed but when it came to
11 signing the release, Ms. Gordon balked and although she
12 signed it, she noted that she signed it under duress. So
13 that was not effectual and not satisfactory for my
14 purposes. So -- and I understood that.

15 So, Mr. Barango-Tariah and I worked very, very
16 hard. He worked very, very hard with his client. He and
17 I worked together, I think very, very well. We tried to
18 reach some accommodation. As he explained to me, his
19 client had indicated that she wanted a little bit more
20 money, that she wanted \$27,000. So, with his permission
21 and with him in the room, I spoke with Ms. Gordon and I
22 was given the indication that \$27,000 would in fact
23 settle the case.

24 So I then spoke to counsel and I explained to
25 him the process again that I wasn't optimistic that we

1 would get anymore and I had actually -- when I spoke to
2 Ms. Gordon, conveyed to her that I was not certain but
3 that I was hopeful that she would keep an open mind given
4 the strength -- the various strengths and weaknesses of
5 each side's case. That the money being offered was
6 significant and reasonable.

7 In any event, I went back to the comptroller's
8 office and I got some additional funds and again, under
9 the impression that this amount would settle the case.
10 Plaintiff's counsel and I discussed it and we have an
11 arrangement by which plaintiff would get \$27,000, exactly
12 the amount that she was asking for. So, I was optimistic
13 again that we could finally resolve this case to
14 everyone's satisfaction, to the plaintiff's satisfaction,
15 to plaintiff's counsel's satisfaction, the comptroller's
16 office and the defendant's satisfaction. Everybody was
17 on board with the numbers.

18 So I'm very disappointed and a little
19 frustrated to now learn that Ms. Gordon is again balking
20 at what I again perceived to be an agreed upon
21 settlement. I have no more money. I will not be able to
22 get anymore money unfortunately and I think everyone's
23 preference is not to litigate the case, particularly in
24 light of the fact that as I said, Ms. Gordon would
25 receive in pocket, the very amount that she was

1 demanding.

2 THE COURT: All right. I guess it's actually
3 pointless to talk about more numbers but let me just note
4 for the record what the current demand is of the
5 plaintiff.

6 MR. BARANGO-TARIAH: Is it plaintiff's counsel
7 or plaintiff, your Honor?

8 THE COURT: Doesn't matter, just give me the --
9 what the current demand is. I don't know if it's been
10 communicated.

11 MR. BARANGO-TARIAH: Your Honor, the current
12 demand is \$27,000 and I believed that I had apparent
13 authority to settle the case. However, today plaintiff
14 is indicating that she is not going to accept the
15 \$27,000. And we have gone ahead and drafted
16 stipulations, your Honor.

17 THE COURT: Now, okay. Well, okay, so what is
18 it that you want at this point, Ms. Gordon?

19 MS. GORDON: I would like to go forward with
20 the --

21 THE CLERK: I'm sorry, can you speak into the
22 microphone.

23 MS. GORDON: Your Honor, I'd like to go forward
24 with the case.

25 THE COURT: All right. Then we need to proceed

1 and decide what we're going to do in this case. Is it
2 still your intention to move to withdraw, Mr. Tariah?

3 MR. BARANGO-TARIAH: Your Honor, I believe that
4 the plaintiff had given me apparent authority to settle
5 this case, in the light of this second separate case,
6 your Honor.

7 THE COURT: Right.

8 MR. BARANGO-TARIAH: I mean I -- I don't know
9 if -- at this point, I would be filing a motion to
10 withdraw, your Honor, because this has been quite
11 expensive for me, your Honor and perhaps if the plaintiff
12 wants to retain another counsel, I am quite happy,
13 your Honor.

14 THE COURT: Well, you know what the rules are
15 and unless -- if Ms. Gordon consents to your withdrawal,
16 I will certainly give her time to obtain new counsel. If
17 she doesn't consent, then we'll have to address your
18 desire to withdraw in writing on notice to the parties,
19 including Ms. Gordon obviously.

20 MR. BARANGO-TARIAH: Yes.

21 THE COURT: So --

22 MR. BARANGO-TARIAH: Your Honor, there is a
23 Second Circuit case that is on point with what we are
24 dealing with, your Honor, and that is Louise Felnell v.
25 TLB Kent Company (ph.). The reference for that case is

1 876 F.2d 498. And I believe that based on that case,
2 this case should be settled for the amount that plaintiff
3 demanded, that she communicated to defense counsel and
4 that would have given me apparent authority to settle
5 that case, your Honor.

6 MS. GORDON: Your Honor, I just want to say
7 that was not my demand. My demand was to -- from the
8 very beginning to go forward to trial with this case.
9 And when given the opportunity to put a figure out there,
10 it was nowhere near what the City was offering, no where
11 near. But I was told time and again that the case would
12 be dismissed if we went forward. Now it has come to a
13 point where they asked me to consider the amount and I've
14 considered it. And I've sent Mr. Barango it in writing
15 that I did give it considering, but I cannot do that. I
16 cannot. It is much more than just dollars and cents
17 here, way more and that's what I've communicated to the
18 Court, to you, your Honor, to Mr. Barango, to everybody.

19
20 THE COURT: Well I think certainly my
21 recollection of what happened in this case comports with
22 the account that Mr. Tariah said. I did encourage
23 settlement. You did come in and talk to me at length. I
24 thought we had reached an agreement on an amount and then
25 there was a problem because you signed the release with

1 the notation it was under protest and we had a further
2 conference which ultimately -- at which you ultimately
3 made clear you were not willing to settle for the amounts
4 discussed. And it was at that point in time that I set
5 -- we did have a further conference and after Mr. Tariah
6 informed me by letter -- and that's really the last I
7 know of the discussions, he sent me a letter on September
8 23 advising that there could be no settlement. He
9 confirmed that he wanted -- he wished to withdraw. And I
10 set a motion schedule.

11 So, I think what Mr. Tariah has stated
12 concerned discussions afterwards -- after his letter; is
13 that correct?

14 MR. BARANGO-TARIAH: Yes, your Honor.

15 THE COURT: Okay. And so I am not sure what
16 you're talking about. Are you talking about the
17 enforceability of the settlement, Mr. Tariah or your
18 right to withdraw, the Second Circuit case that you are
19 citing?

20 MR. BARANGO-TARIAH: Well, your Honor, the
21 Second Circuit case is the enforceability, your Honor.
22 It's the issue of enforceability.

23 THE COURT: Well, you are not in a position,
24 Mr. Tariah to be making such a motion. I'm not sure the
25 defendants are in a position to be making such a motion.

1 You wouldn't be properly representing your client in
2 making a motion, I think, to force your client to settle
3 but I haven't read the -- what, Fellner case you said is
4 what it is called?

5 MR. BARANGO-TARIAH: Yeah, it's Louise Fellner.
6 Your Honor, this is the demand that she communicated and
7 we have gone ahead and prepared papers. This is the
8 second time, your Honor. I mean there's probably going
9 to be a situation where I'll be working on the case and
10 then she would communicate another demand.

11 MS. GORDON: No, actually it isn't
12 (indiscernible).

13 MR. BARANGO-TARIAH: Just -- so, your Honor,
14 that is what I am faced with here.

15 MS. GORDON: As a matter of fact, last Tuesday
16 when Mr. Barango called me and told me that he received
17 the Rule 68 -- well, he didn't tell me what it was he
18 received but he told me to come into the office to see
19 him. I went to see him and then he presented the Rule 68
20 which was to, you know -- he explained all of that and it
21 was at that time that he got --

22 THE CLERK: I'm sorry.

23 MS. GORDON: -- at that time that he encouraged
24 me to speak to Jeff --

25 THE COURT: Dantowitz.

1 MS. GORDON: Yes. And I obliged them and I
2 listened. And they asked me to consider and I considered
3 it. And as much as we're going back and forth, but I
4 don't think -- I mean I am trying to accommodate and be
5 reasonable but I've asked from the very beginning that we
6 go forward with this case. I really believe -- I'm
7 passionate about going forward with the case. And even
8 though I've listened and have considered and -- but my
9 desire, my wish, my -- and this was conveyed to Mr.
10 Barango from the very beginning that I wished to go
11 forward with this case.

12 THE COURT: Obviously this isn't a matter that
13 can be simply decided based on the statements made today.
14 So, I'll set a motion schedule and you can decide,
15 Mr. Tariah, how you wish -- what sort of motion you wish
16 to be filing. I don't know what --

17 MR. DANTOWITZ: Your Honor?

18 THE COURT: Yes.

19 MR. DANTOWITZ: Mr. Tariah had given me the
20 citation to the case that he mentioned to you. I have
21 not, unfortunately been able to read it yet, but I would
22 not want to make such a motion until the representation
23 issue is decided, eve if I were to proceed in that way.

24 I suppose one question I might have is -- and I
25 can understand also, your Honor's point that it might be

1 uncomfortable or possibly even improper if Mr. Tariah
2 were to make that motion to compel the settlement, I
3 guess one initial question I have is whether Ms. Gordon
4 would in fact consent to Mr. Tariah's withdrawal which
5 would then obviate any of that motion practice, the
6 defendants wouldn't take the position that's -- I'll
7 leave that to the Court.

8 THE COURT: Well that was certainly a question
9 that I had posed before Mr. Tariah made his statements
10 about the -- based on Fellner.

11 MR. DANTOWITZ: I'm sorry, then if I'm
12 repeating it, I had not heard the response. I apologize.

13 THE COURT: No, I had mentioned that -- I
14 assumed that we would go back to considering whether or
15 not the plaintiff's counsel wished to proceed and if he
16 did, if he wanted to move to withdraw, whether or not the
17 plaintiff would consent. And so --

18 MS. GORDON: And my answer to that is
19 absolutely no -- absolutely not.

20 THE COURT: As I said, I haven't read Fellner,
21 so I will set a motion schedule and you will consider
22 whether or not it's appropriate for you to be making a
23 motion to enforce a settlement given the difficulty, I
24 have no idea, I think it would be for you to be seeking
25 to enforcement a settlement, essentially against your

1 client of record.

2 MR. BARANGO-TARIAH: Your Honor, I do not wish
3 to make a motion --

4 THE COURT: To enforce a settlement or --

5 MR. BARANGO-TARIAH: No.

6 THE COURT: -- to withdraw?

7 MR. BARANGO-TARIAH: I'm just bringing it to
8 the attention of the Court that based on the Second
9 Circuit law, I did have apparent authority to go ahead
10 and settle this case.

11 THE COURT: I'm not going to listen to you
12 repeat your argument. I'll set a motion schedule. All I
13 am asking you is to consider whether or not it's
14 appropriate for you to be making the motion. I have no
15 idea if Fellner was simply a decision to enforce an oral
16 agreement or whether or not it was a decision involving
17 an attorney seeking to enforce an agreement against his
18 own client. Whatever the case may be, I'm not making any
19 kind of decision today. Whatever happens next will have
20 to be on notice and fully briefed. So I'll set a motion
21 schedule again and we'll see -- we'll decide that motion
22 when we have to decide it once it's fully briefed.

23 MR. BARANGO-TARIAH: Your Honor -- and that
24 motion is for what, your Honor?

25 THE COURT: That's for you to decide. You

1 sound quite adamant that you have a right to bring a
2 motion to enforce the settlement. I will just set a
3 motion schedule as to -- and I'll leave it to you to see
4 whether or not you have the right to seek to enforce the
5 settlement.

6 MR. BARANGO-TARIAH: Your Honor, I would at
7 this --

8 THE COURT: Okay. Let me just note then, we're
9 back on the record and we'll so note.

10 Let me sum up what happened with respect to the
11 proceedings under seal, and that is that Mr. Tariah
12 advised that he felt that he -- that there was an
13 enforceable settlement under the circumstances here and
14 -- which are -- I guess fall within the ambit of Louis
15 Fellner, a Second Circuit case reported at 865 F.2d 498.
16 Now I haven't read the case, so I am somewhat
17 uncomfortable with the notion based on what I've heard,
18 with the notion that the plaintiff doesn't agree to the
19 settlement numbers offered and that her attorney would be
20 seeking to enforce the settlement.

21 Whatever happens needs to be determined sooner
22 rather than later. So assuming you want to proceed to
23 enforce a settlement, I'll set a motion schedule and it
24 will have to be on notice to your client, Mr. Tariah. I
25 just cannot believe that you would have the right to do

1 so but as I said, I haven't read Fellner and I'm quite
2 familiar with the body of case law in the Second Circuit
3 concerning the enforceability of settlements, oral
4 settlements made.

5 Anyway --

6 MR. DANTOWITZ: Your Honor?

7 THE COURT: Yes.

8 MR. DANTOWITZ: I'm sorry to complicate
9 matters. It may very well be that the plaintiff is not
10 entitled to bring such a motion. In my own research, I
11 may -- it's all hypothetical, may find that the
12 defendants might want to bring such a motion. I'm afraid
13 that motion might put Mr. Tariah in a conflict position.

14 THE COURT: Absolutely.

15 MR. BARANGO-TARIAH: Yeah, your Honor. I do
16 not intend to bring such a motion. I'm only bringing it
17 to the attention of the Court.

18 THE COURT: Well then enough said. I've
19 already -- I'm not going to repeat myself. I think
20 Mr. Dantowitz is absolutely correct which is what I've
21 been indirectly suggesting I hear Ms. Gordon saying she
22 doesn't consent to your withdrawal to representation and
23 you had previously indicated you were going to seek to
24 withdraw if there was no settlement in this case. Maybe
25 I should ask you first whether or not you seek to do so

1 and if you do, I'll set another schedule and if the
2 defendants wish to move to enforce the settlement, then
3 the defendants can do so too.

4 MR. BARANGO-TARIAH: Your Honor, I don't wish to
5 file any motions, your Honor.

6 THE COURT: So you'll just proceed?

7 MR. BARANGO-TARIAH: Yes. Yes, your Honor.

8 THE COURT: Okay.

9 MR. BARANGO-TARIAH: If any motions are filed
10 since the plaintiff will not relieve me, I will just have
11 to respond to any motions that I filed, your Honor.

12 THE COURT: Okay. So are you going to file a
13 motion, Mr. Dantowitz?

14 MR. DANTOWITZ: I haven't, as I mentioned, I'm
15 not yet familiar with the laws surrounding this subject
16 matter. I've never come across it before, fortunately.
17 If I don't make such a motion, it's very likely we would
18 move for summary judgment.

19 THE COURT: Okay. I had previously set a
20 schedule for summary judgment and I'll set another
21 schedule for a summary judgment motion.

22 MR. DANTOWITZ: Fine.

23 THE COURT: And I will leave it -- well
24 actually, you can certainly move to enforce the
25 settlement within the procedural mechanism of a summary

1 judgment motion. So I will just set a motion schedule
2 and you can raise whatever arguments you see fit to
3 raise, Mr. Dantowitz.

4 MR. DANTOWITZ: Thank you.

5 THE COURT: Okay. Judge Korman doesn't have
6 any premotion conference requirements. So I will set a
7 motion schedule. I will just note in the minute entry
8 any dispositive motions must be filed by a date certain.
9 So, I'll hear from counsel what they propose.

10 MR. DANTOWITZ: Your Honor, I would, with the
11 Court's indulgence, respectfully request that I have
12 until the end of the year to file the motion.

13 THE COURT: Okay. Is there any opposition?

14 MR. BARANGO-TARIAH: No. No, no, your Honor.
15 It's just that I will not be available in the first three
16 weeks of January, your Honor.

17 THE COURT: Okay. Are you around the end of
18 December?

19 MR. BARANGO-TARIAH: Yes, I am, your Honor.

20 THE COURT: Is it possible to shave some time
21 off Mr. Dantowitz?

22 MR. DANTOWITZ: It's possible. What I am
23 concerned about are December vacations. I know I have my
24 own vacation --

25 THE COURT: When --

1 MR. DANTOWITZ: It's not set yet but my wife
2 and I have been talking about doing something in
3 December. So I can try.

4 THE COURT: Okay. Well --

5 MR. DANTOWITZ: I'm also concerned about
6 clients that need affidavits and such.

7 THE COURT: Yes, I think given the holidays, it
8 may make sense to try to get the motion out before
9 Christmas.

10 MR. DANTOWITZ: Uh-huh.

11 THE COURT: So how about December 15?

12 MR. DANTOWITZ: Okay.

13 THE COURT: And then Mr. Tariah, the end of the
14 year or do you want -- are you around the first week of
15 January?

16 MR. BARANGO-TARIAH: Yeah, I probably can
17 stretch it into the first week because I will need at
18 least three weeks to respond to that motion, your Honor.

19 THE COURT: Okay. January 6 and the
20 defendant's reply, I'll give you two weeks later, the
21 20th?

22 MR. DANTOWITZ: Very good, your Honor.

23 THE COURT: When will you be back in town,
24 Mr. Tariah?

25 MR. BARANGO-TARIAH: I believe I'll be back

1 around about the 25th of January, your Honor.

2 THE COURT: Okay. So the motion will be fully
3 briefed on the 20th. I can't remember now if you need to
4 set a motion return date. I don't think so. You'll need
5 to confer with Judge Korman's case manager on a return
6 date. Just remember that Judge Korman has what we call
7 the bundling rule and no motions are to be -- no motion
8 papers are to be filed until the motion is fully
9 submitted -- I mean fully briefed.

10 MR. BARANGO-TARIAH: Right.

11 THE COURT: Okay?

12 MR. BARANGO-TARIAH: Right.

13 THE COURT: Okay.

14 MR. BARANGO-TARIAH: Thanks, your Honor.

15 THE COURT: Uh-huh.

16 MR. DANTOWITZ: Thank you, your Honor.

17 MS. GORDON: Thank you, your Honor.

18 (Matter concluded)

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C E R T I F I C A T E

I, LINDA FERRARA, hereby certify that the foregoing transcript of the said proceedings is a true and accurate transcript from the electronic sound-recording of the proceedings reduced to typewriting in the above-entitled matter.

I FURTHER CERTIFY that I am not a relative or employee or attorney or counsel of any of the parties, nor a relative or employee of such attorney or counsel, or financially interested directly or indirectly in this action.

IN WITNESS WHEREOF, I hereunto set my hand this 28th day of November, 2011.



Linda Ferrara

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